IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

WRIT PETITION NO. 7328 OF 2005 .

Zarine F. Munshi & anr. ... Petitioner.

V/s.

Ardeshir F. Vakil & anr. ... Respondents.

Shri Milind Sathe with Alpana Ghone and Amay Ghokhani i/b A.S. Dayal & Associates for the petitioner.

Shri Amin Kherade i/b Advani & Co. for respondent No.4.

CORAM : V.C.DAGA, J.

DATED : 7.12.2005.

P.C. :

. On the motion made by the learned Counsel for the petitioner, he is allowed to delete name of respondent No.3 from the array of parties, at the risk of the petitioner. Amendment to be carried out during the course of the day.

2. Rule returnable forthwith. Heard finally by consent of parties.

3. It is not in dispute that defendant No.1 expired on 18.1.2002. However, no such intimation was given either to the Court or to the plaintiff by the Counsel appearing for the original defendant in the suit. In the cross suit filed by the tenant; wherein the plaintiff, who was defendant (suit

bearing R.A.D. Suit No. 2447 of 1991) substitution proceedings were taken out, that is how the petitioners herein came to know about the death of respondent No.1.

4. The petitioners herein appear to have taken out proceedings for substitution in their suit with a prayer to set aside abatement, which came to be rejected by the trial Court by the order dated 14.10.200. The said order of the trial Court has been confirmed by the lower appellate Court vide its order dated 12.8.2005. This order is the subject matter of challenge in the present petition filed under Article 227 of the Constitution of India.

5. Heard rival parties. It is not in dispute that for the first time petitioners came to know about the death of petitioner No.1 on 18.1.2003, through notice for substitution taken out in the cross suit filed by the respondents herein in the trial Court. Thereafter, it was expected on the part of the petitioners to take steps to substitute the name of the deceased within 90 days. It is no doubt true that the application made for substitution was taken out by the petitioners in the month of June, 2003 along with application for condonation of delay with a prayer to set aside abatement. It is no doubt true that there is a delay in moving application for substitution. If

delay is calculated from the date of intimation, there appears to be a delay of about 90 days. The trial Court appears to have wrongly computed the delay. Reasonable explanation has been given in the application for condonation of delay saying that the substitution proceedings in the connected suit were pending and they were decided on 21.6.2003. Immediately thereafter, substitution proceedings were taken out.

6. Considering the explanation given the Courts below ought to have condoned delay and ought to have allowed prayer for substitution by setting aside abatement. In this view of the matter, considering the explanation furnished, petition is liable to be allowed. Impugned order of the Court below is liable to be set aside. Motion for substitution is also liable to be allowed, however, subject to payment of costs quantified in the sum of Rs. 5,000/- (Rs.five thousand only) to be paid to the respondent within 2 weeks from today. Petition stands disposed of. Rule is made absolute in terms of this order with no order as to costs.